IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 5, 2009 Session

SECURED FINANCIAL SOLUTIONS, LLC ET AL. v. PETER WINER

Appeal from the Chancery Court for Williamson County
No. 34792 Robbie T. Beal, Judge

No. M2009-00885-COA-R3-CV - Filed January 28, 2010

The president of a financial planning services company and his company sued a financial advisor for defamation and false light invasion of privacy based upon an e-mail sent by the financial advisor to a former colleague in the financial planning industry. The trial court granted the defendant's motion for summary judgment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Andrew S. Naylor and John E.B. Gerth, Nashville, Tennessee, for the appellants, Secured Financial Solutions, LLC and Anil Vazirani.

Richard E. Spicer, Nashville, Tennessee, for the appellee, Peter Winer.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Anil Vazirani is the president of Secured Financial Solutions, LLC ("SFS"), a company headquartered in Arizona that provides financial planning services through a network of affiliated advisors. Vazirani maintained a close association with a Nashville-based financial services company called Covenant Reliance Producers, LLC ("CRP"). Both SFS and CRP advised pre-retirees and retired investors to help them achieve their retirement goals. Peter Winer was a vice-president at CRP at one time and, in this capacity, occasionally interacted with Vazirani. In a deposition, Winer stated that he did not like

Vazirani and had recommended that CRP end its affiliation with him. In January 2008, Winer left CRP and opened his own financial planning business in Tennessee.

Several months after leaving CRP, Winer was told by Fredric Katz, an annuity producer in the same general industry as Winer and Vazirani, that he had heard during a conversation at a business conference that Vazirani was in some kind of trouble and possibly was being shut down.[1] Katz asked Winer if he knew whether this information was true. After hearing this rumor, Winer called Greg Bisson, an independent annuity producer with an office at CRP and one of Vazirani's top advisors. According to his deposition testimony, Winer asked Bisson: "I heard something might be going down with Anil [Vazirani], and what do you know? Have you heard anything?" On May 20, 2008, Winer sent an e-mail containing the following language to Mike Wallin, a CRP employee who marketed CRP services to insurance agents:

> I heard through the grapevine that Anil was "getting shut down." The person said something was going down with regulators, but I have no idea. Sure hope its [sic] true. I would love to know. If you can confirm ANYTHING . . . on the record . . . off the record . . . hint at something . . . I sure would be appreciative.

In June 2008, Vazirani and SFS filed this lawsuit against Winer asserting claims for defamation (libel) on behalf of both plaintiffs and false light invasion of privacy on behalf of Vazirani. The parties engaged in discovery. In January 2009, Winer moved for summary judgment. The trial court granted Winer's motion and made the following findings:

> [T]he Court finds that as a matter of law, the requirements of libel and false light invasion of privacy cannot be met and are not met. The Defendant has properly negated an essential element of the Plaintiff's case, specifically by affirmatively establishing that the email/communication is not defamatory. In coming to this conclusion, the Court took into consideration the Plaintiff's arguments regarding the motive of the Defendant for sending the subject email, but even in light of said arguments, the communication, as a matter of law, is not libel or false light invasion of privacy, nor is it an affirmative assertion about the Plaintiff. The Court finds that no reasonable juror could take the email/communications as affirmative statements concerning the Plaintiff. The communications would instead be legitimate inquiry concerning something that Defendant had heard from Frederic Katz, and was the

[1]There is a dispute in the record as to whether Katz orally communicated this information to Winer or sent him an e-mail.

> Defendant's legitimate efforts to determine the truth of said information. As such, the Court finds that the comunications/email does not satisfy the requirement that the Defendant published a libelous statement . . . .

Finding no genuine issue for trial, the trial court granted the motion for summary judgment and dismissed the case.

STANDARD OF REVIEW

In reviewing a summary judgment, this court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisified. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). The party seeking summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). We must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Id.*; *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn. 1993). If there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847 S.W.2d at 211; *EVCO Corp. v. Ross*, 528 S.W.2d 20, 25 (Tenn. 1975). To shift the burden of production to the nonmoving party who bears the burden of proof at trial, a moving party must negate an element of the opposing party's claim or "show that the monmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn. 2008).

ANALYSIS

Vazirani and SFS argue on appeal that the trial court erred in granting summary judgment in favor of Winer on their claims for defamation and false light invasion of privacy.

Libel is written defamation. *Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.,* 876 S.W.2d 818, 820 (Tenn. 1994). To establish a prima facie case of defamation, a plaintiff must prove that "1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999) (citing RESTATEMENT (SECOND) OF TORTS § 580B[2] (1977)). In the context of defamation, "publication" is a term of art meaning "the

[2]Section 580B of the RESTATEMENT (SECOND) OF TORTS concerns defamation of private persons. The RESTATEMENT contains another section with respect to defamation of public officials or public figures. (continued...)

communication of defamatory matter to a third person." *Id.* A claim for defamation requires proof that "the defendant communicated a false and defamatory statement to the person of another, and that as a result thereof the plaintiffs suffered actual damages." *Shipley v. Tenn. Farmers Mut. Ins. Co.*, No. 01-A-01-9011CV00408, 1991 WL 77540, at *5 (Tenn. Ct. App. May 15, 1991) (citing *Emerson v. Garner*, 732 S.W.2d 613, 617 (Tenn. Ct. App. 1987)). A statement is defamatory if "it tends so to harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from associating or dealing with him [or her]." *Biltcliffe v. Hailey's Harbor, Inc.*, No. M2003-02408-COA-R3-CV, 2005 WL 2860164, at * 4 (Tenn. Ct. App. Oct. 27, 2005) (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

While the question of whether a statement was understood by the hearers in a defamatory sense is a fact question for the jury, "[t]he preliminary question of whether the statement is at all 'capable' of being understood in this defamatory sense is a question of law which should be determined by the court." *Shipley*, 1991 WL 77540, at *5 (citing *Stones River Motors, Inc. v. Mid-South Publ'g Co., Inc.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983)). In making this determination, a court must consider whether "[t]he import of this language taken as a whole could reasonably be capable of a defamatory meaning." *Id.* The words must be given their natural and ordinary meaning "as would be reasonably understood by the people who hear them." *Id.* Statements alleged to be defamatory "should be judged within the context in which they are made" and "read as a person of ordinary intelligence would understand them in light of the surrounding circumstances." *Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000).

The plaintiffs correctly point out that a defamatory statement can be couched in the form of a question. *McCluen*, 936 S.W.2d at 940. To be defamatory, "a question must be reasonably read as an assertion of a false fact; inquiry itself, however embarrassing or unpleasant to its subject, is not accusation." 50 AM. JUR. 2D *Libel and Slander* § 154 (2006) (citing *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993)). A question is not defamatory if it reflects "a genuine effort to obtain information." Robert D. Sack, SACK ON DEFAMATION § 2.4.8 (3d. ed. 1999). In the present case, looking at the e-mail as a whole, we conclude that the e-mail "is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense." *Biltcliffe*, 2005 WL 2860164, at *4. We agree with the trial court's conclusions: "[N]o reasonable juror could take the email/communications as affirmative statements concerning the Plaintiff. The communications would instead be legitimate inquiry concerning something that Defendant

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[2](...continued)
RESTATEMENT (SECOND) OF TORTS § 580A. This distinction has been recognized in Tennessee caselaw. *McCluen v. Roane County Times, Inc.*, 936 S.W.2d 936, 939 (Tenn. Ct. App. 1996).

had heard from Frederic Katz, and [were] the Defendant's legitimate efforts to determine the truth of said information." Therefore, the trial court properly granted summary judgment in favor of Winer on the defamation claim.

As to the false light claim, the plaintiffs argue that the trial court erroneously granted summary judgment without providing any explanation in its order. We have concluded that the trial court's grant of summary judgment was proper.

The Tennessee Supreme Court has expressly recognized the tort of false light invasion of privacy. *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 645 (Tenn. 2001). The definition of false light invasion of privacy adopted by the Supreme Court appears in Section 652E of the RESTATEMENT (SECOND) OF TORTS:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id. at 643-44 (quoting RESTATEMENT (SECOND) OF TORTS § 652E (1977)). Unlike defamation, which involves injury to one's reputation, false light invasion of privacy involves "injury to [the] inner person." *Id.* at 645-46 (alteration in original) (quoting *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1984)).

What is meant by the term "publicity" used in Section 652E? Comment *a* to Section 652E of the RESTATEMENT (SECOND) OF TORTS refers back to Comment *a* to Section 652D, which states:

> "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of

> communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.
>
> Thus it is not an invasion of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.

This court has previously relied upon this definition of "publicity" to find that the communication of information regarding the plaintiff's hospitalization to his employer did not constitute an invasion of privacy under § 652D of the RESTATEMENT (SECOND) OF TORTS (concerning publicity given to private life) because disclosure to one person or a small group was not sufficient to sustain an action. *Major v. Charter Lakeside Hosp., Inc.*, No. 42, 30011, 1990 WL 125538, at *5 (Tenn. Ct. App. Aug. 31, 1990). In a case decided under Tennessee law, a federal district court addressing the issue in the specific context of § 652E concluded that an e-mail sent to three people and a letter sent to one person were not "publicized" within the meaning of a false light invasion of privacy. *L-S Indus., Inc. v. Matlack*, 641 F. Supp. 2d 680, 687-88 (E.D. Tenn. 2009).

In the present case,Vazirini bases his claim of false light invasion of privacy on Winer's sending the e-mail in question to one person (and possibly also making a similar oral communication to another person). Such communication fails, as a matter or law, to satisfy the "publicity" requirement of the tort of false light invasion of privacy. The trial court properly concluded that "the communication, as a matter or law, is not libel or false light invasion of privacy."

CONCLUSION

The decision of the trial court is affirmed. Costs of appeal are assessed against the appellants, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE